Filed 4/24/06 Graff v. Vallejo City Unified School Dist. CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JANE A. GRAFF, **Plaintiff and Appellant,** **v.** **VALLEJO CITY UNIFIED SCHOOL DISTRICT,** **Defendant and Respondent.**	**A108600** **(Solano County Super. Ct. No. FCS 020414)**

Following entry of judgment against plaintiff Jane Graff in her lawsuit against defendant Vallejo City Unified School District (District) alleging violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), she filed a timely appeal (A106121). We affirmed that judgment in a separate opinion filed concurrently with this opinion. Plaintiff also filed, in the trial court, a motion for determination of prevailing party and request for attorney fees pursuant to Government Code section 12965, subdivision (b) and Code of Civil Procedure section 1021.5. That motion was denied on September 10, 2004, and this separate appeal followed (A108600). Plaintiff argues that she is entitled to attorney fees, even though all of her substantive claims were rejected by the court's decision to grant the motion for nonsuit as to three claims and by the jury's defense verdict on the remaining claim for reasonable accommodation. We affirm.

FACTUAL BACKGROUND

Plaintiff, who is deaf, was hired as a substitute teacher by the District in April 1996. At that time, the District used a "manual system," administered by a substitute clerk, for contacting substitutes to fill teacher absences. Plaintiff communicated with the substitute clerk using the California Relay System (CRS), which uses an operator to receive and transmit information between a "hearing" caller and a deaf person using a TTY (teletypewriter). By December 1999, the District had installed and activated a telephone-based "Substitute Employee Management System" (SEMS), that allows teachers access to employment opportunities 24 hours a day. In April 2000, plaintiff attempted to register with the SEMS. The following month, she informed the substitute clerk and the District director of human resources (Nona Bowman) of plaintiff's inability to access the new system with her TTY. Although other substitutes were not permitted to contact the substitute clerk to learn of placement opportunities, plaintiff was told she could continue to do so by TTY using the CRS.[1]

On October 26, 2000, plaintiff filed a discrimination charge against the District under the FEHA with the California Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC). The EEOC charge alleged plaintiff had been denied substitute opportunities because the District had not provided her with a reasonable accommodation. Mediation proved unsuccessful.

Following the mediation, Bowman wrote a May 18, 2001 letter to plaintiff advising her that she could continue to find placement opportunities by contacting the substitute clerk or by accessing the SEMS through the CRS. Bowman had been advised by an EEOC investigator that the SEMS could be accessed via the CRS. The letter invited plaintiff to contact Bowman if she required further reasonable accommodation.

In March 2002, plaintiff filed suit in federal court. In conjunction with the resulting mediation, an attorney for plaintiff contacted the District, suggesting an

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[1] Plaintiff substituted 13 days between April and June 2000, and another 60 days during the 2000-2001 academic year.

internet-based technology to make the substitute placement information available on line. In addition, Bowman learned from the producer of the SEMS that an internet-based system referred to as the "WebCenter" was under development and would be compatible with the telephone-based SEMS. However, the WebCenter was not yet available for purchase.

Following a March 19, 2002 meeting with plaintiff, Bowman sent plaintiff a letter dated April 1, 2002, stating that plaintiff could continue to access the substitute clerk by telephone or email and that the District would be evaluating an internet-based application. The letter also invited plaintiff to discuss any further accommodations.

On August 16, 2002, plaintiff filed suit against the District in Solano County Superior Court.

During the 2002-2003 academic year, plaintiff contacted the District five to ten times and accepted a substitute placement once. During the 2003-2004 academic year, plaintiff accepted no work from the District despite being offered numerous placement opportunities.

Meanwhile, in the fall of 2002, the District submitted a requisition to purchase the WebCenter. The District's governing board approved the purchase in December 2002. Plaintiff was verbally advised on January 10, 2003, and again by letter dated January 24, that the District had acquired the WebCenter. On March 14, 2003, the District issued an offer to compromise to plaintiff pursuant to Code of Civil Procedure section 998[2] in which the District offered to purchase the WebCenter and pay plaintiff $7,500. The vendor installed the WebCenter in the spring of 2003. Plaintiff was informed that the WebCenter was operational, was given a pin number, but was only able to access the system once. Because the District experienced problems making the new system functional, stable, and available online, the WebCenter did not become fully operational until November 2003.

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[2] All undesignated section references are to the Code of Civil Procedure.

DISCUSSION

Plaintiff argues that her litigation, although it proved unsuccessful on all claims, was a catalyst to the District's decision to purchase the WebCenter, and the trial court committed reversible error by conditioning her eligibility for attorney fees on a favorable jury verdict.

Section 1021.5, which codifies the private attorney general doctrine of attorney fees, provides in part that a court can award such fees to the successful party when the litigation "has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Whether a plaintiff has satisfied all of the elements for an award of attorney fees under section 1021.5 is a determination that lies within the trial court's discretion. (§ 1021.5; *Schmier v. Supreme Court* (2002) 96 Cal.App.4th 873, 877.) "As applied, this rule means that we should not reverse unless 'the record establishes there is no reasonable basis' for the trial court's action. [Citation.]" (*Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 965.) In addition, the court's judgment or order is presumed correct on appeal and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

We are persuaded that in light of the language and purposes of section 1021.5, as well as the case law construing it, the trial court properly exercised its discretion.

Plaintiff correctly notes that on a motion for attorney fees the trial court " 'must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award under section 1021.5." [Citation.]' [Citation.]" (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 566.) Plaintiff then argues that the trial court erred by basing its denial of relief on the fact the District prevailed on the merits. Our Supreme Court has consistently concluded that a party is a "successful party," entitled to attorney fees, even

when that party has not obtained a favorable final judgment. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 352; accord, *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608; *Graham*, at pp. 560-561.) In *Westside Community*, the court explained that such an award may be justified when " 'plaintiffs' lawsuit was a *catalyst* motivating defendants to provide the primary relief sought' " and when such relief vindicates an important right that benefited the public interest. (*Westside Community*, at p. 353.)

Plaintiff misconstrues the trial court's ruling.[3] The trial court properly interpreted the jury's decision on the reasonable accommodation claim as a determination that either adoption of the SEMS did not deny plaintiff the same benefits and privileges enjoyed by other employees (because plaintiff could access the system) or, alternatively, any negative impact was promptly accommodated by permitting plaintiff to continue utilizing the substitute clerk.[4] The jury certainly rejected plaintiff's claim that the SEMS

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[3] The trial court reasoned as follows:

". . . To award plaintiff fees, the court would have to find (1) that plaintiff was the prevailing party by serving as a catalyst to cause defendant to acquire the WebCenter and (2) that acquisition of the WebCenter was required as a form of reasonable accommodation for plaintiff. The court cannot make the latter finding in light of the jury's verdict and the court's prior determination that defendant is the prevailing party.

"As plaintiff's suit spanned the period of time both before and after the WebCenter became available on the market and was acquired and installed by defendant, implicit in the jury's verdict for defendant is the determination that plaintiff was reasonably accommodated by defendant without the WebCenter. The court cannot substitute its judgment for the jury.

"Based upon the jury's verdict and the judicial determination that defendant is the prevailing party in this action, plaintiff's motion for attorney fees is denied."

[4] Evidence was presented in the trial that: (1) plaintiff could likely access the SEMS by using her TTY to contact the CRS; (2) the District authorized plaintiff to telephone or email the substitute clerk for employment opportunities; (3) plaintiff substituted for the District numerous times subsequent to the installation of the SEMS, suggesting that such accommodations worked; and (4) "no" employees, including plaintiff, used the WebCenter.

negatively impacted her and the District failed to reasonably accommodate her until it purchased and implemented the WebCenter.

Further, we question whether plaintiff can be deemed "successful" in any sense of that word. The catalyst theory ensures that a party can recover fees under section 1021.5 when its lawsuit creates a significant public benefit, even if no court order produced the modification in defendant's behavior. Thus, a settlement that confers a substantial public benefit justifies a fee award, though there is no final judgment in plaintiff's favor. (*Fletcher v. A. J. Industries, Inc.* (1968) 266 Cal.App.2d 313, 325, cited with approval in *Graham v. DaimlerChrysler Corp., supra,* 34 Cal.4th at p. 566.) In addition, if the lawsuit leads the defendant to voluntarily alter its behavior, effectively mooting the litigation, fees may be appropriate. (*Graham*, at pp. 565-566; accord, *Tipton-Whittingham v. City of Los Angeles*, *supra*, 34 Cal.4th at pp. 607, 610.) However, we are aware of no case, and plaintiff has not referred us to any, where fees were awarded to a plaintiff whose claims were rejected on the merits in a jury trial and the resulting judgment was affirmed on appeal. (See *Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1842 [despite the rule that "a 'successful party' . . . need not achieve a favorable final judgment," "we can find no case where the party who actually obtained an affirmance on appeal of a dismissal in its favor was held responsible for attorney fees under any theory"]; see also *National Parks & Conservation Assn. v. County of Riverside* (2000) 81 Cal.App.4th 234, 239-240 [given that plaintiff "did not receive even a partial victory" in this litigation, it "is not entitled to the requested fees"]; *Macias v. Municipal Court* (1986) 178 Cal.App.3d 568, 579-580.)

In any event, even if plaintiff is credited with forcing the District to obtain the WebCenter, that purchase has not resulted in any significant public benefit. The jury concluded any problem the SEMS caused plaintiff had been reasonably accommodated long before the purchase and implementation of the WebCenter. Further, the record reflects that "no one," including plaintiff, had ever used the WebCenter to access the SEMS.

Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387 is instructive. In that matter, Consumer Cause, Inc., filed a lawsuit on behalf of itself and the general public against Whole Foods Market California, Inc., alleging violations of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.). After a successful mediation, the parties agreed to settle the suit. (*Consumer Cause, Inc.*, at p. 392.) Included in the settlement was an agreement by Consumer Cause, Inc., to amend its complaint to allege that it was pursuing claims on behalf of all persons similarly situated. In return for certain concessions by Whole Foods Market California, Inc., and a cross-defendant, Old Durham, Consumer Cause, Inc., and all class members who did not opt out would generally release all claims against Whole Foods Market California, Inc., and the cross-defendants for the Health and Safety Code violations. (*Id.* at p. 393.)

Nicholas Giampietro, an unnamed member of the putative class, filed objections to the class certification and the proposed settlement on behalf of himself and all absent class members. The trial court relied on Giampietro's stated objections and denied the motion for class certification and final settlement approval. Giampietro then sought attorney fees under section 1021.5. (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, supra*, 127 Cal.App.4th at pp. 393-394.)

In upholding the trial court's decision to deny attorney fees, the appellate court held, "Giampietro's efforts did not result in the enforcement of an important right affecting the public interest. Although Giampietro insists he protected the right of members of the putative class to sue Whole Foods Market California, Inc., for violations of the Health and Safety Code unhindered by an overbroad release . . . , the putative class members had the right to opt out of the class and the proposed classwide settlement. Freeing putative class members from the constraints of a proposed settlement agreement they had the right to disregard by exercising their opt-out right is hardly the kind of important public right contemplated by section 1021.5. [Citation.]" (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc., supra*, 127 Cal.App.4th at pp. 403-404.)

Thus, even if we agreed with plaintiff that she succeeded in her goal of requiring the District to obtain the WebCenter, we would deny the fees sought. Like the objector in *Consumer Cause, Inc.*, plaintiff achieved no significant public benefit thereby and, so, is not a successful party under section 1021.5.[5]

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.

[5] Plaintiff also sought fees under the FEHA (Gov. Code, § 12965, subd. (b)). Under that statute, the trial court performs the same function it performs under Code of Civil Procedure section 1021.5: It "must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award under a private attorney general theory." (*Woodland Hills Residents Assn. Inc. v. City Council* (1979) 23 Cal.3d. 917, 938.) Thus, for the same reasons we denied recovery of fees under section 1021.5, we deny fees under the FEHA.